United Nations A/CN.9/SR.914

General Assembly

Distr.: General
6 August 2010

Original: English

United Nations Commission on International Trade Law

Forty-third session

Summary record of the 914th meeting

Held at Headquarters, New York, on Tuesday, 29 June 2010, at 3 p.m.

Chairperson: Ms. Sabo (Vice-Chairperson) ..... (Canada)

Contents

Finalization and adoption of a draft Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property (*continued*)

Possible future work in the area of security interests

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of this document* to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

10-42766 (E)

Please recycle

The meeting was called to order at 3.15 p.m.

Finalization and adoption of a draft Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property (*continued*)
(A/CN.9/700/Add.6-7; A/CN.9/XLIII/CRP.5, A/CN.9/XLIII/CRP.7 and A/CN.9/XLIII/CRP.8)
A/CN.9/700/Add.6, chapter X (*continued*)

1. **Mr. Deschamps** (Canada) read out the following revised text of his delegation's proposal for recommendation 248:

> "**Recommendation 248**
>
> The law should provide that the law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected.
>
> The law should in addition provide that a security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee.
>
> The law should provide that the law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located."

2. **The Chairperson** said that the essential change was that enforcement was now subject to the law of the grantor's location. The revised proposal was supported by the majority of members and observers. The adoption of a single rule balancing the various interests and the elimination of options would provide certainty, make the rule straightforward in application and lead to a predictable result. The text met the objectives of the *Guide* and the draft Supplement. It might not correspond exactly to the systems in force in all States, but it had important advantages. She asked the Commission if the proposed rule was acceptable.

3. **Mr. Monardes** (Chile) said that although his delegation preferred option A in document A/CN.9/700/Add.6, it was ready to support the revised Canadian text. However, he would like it recorded, either in the commentary or in the report, that it was his delegation's understanding that the law of the grantor's location governed the enforcement of the security right in intellectual property only to the extent allowed by the *lex protectionis*.

4. **Mr. Deschamps** (Canada), concurring, said that a number of delegations, including his own, wanted the commentary to make it clear that issues of transferability upon enforcement would remain governed by the *lex protectionis*, in view of the considerations that had been set out by the secretariat at an earlier meeting and in view of recommendation 4 (b) of the *Guide*. The comments on that principle found in document A/CN.9/XLIII/CRP.7 could be used as a basis for the commentary, and he had no objection to having the report mention the matter.

5. **The Chairperson** said she took it that the Commission wished to adopt the revised text of draft recommendation 248 proposed by Canada, thus disposing of the last substantive issue to be resolved.

6. *It was so decided.*

7. **The Chairperson** invited the Commission to turn to the commentary to recommendation 248 contained in document A/CN.9/700/Add.6.

8. **Mr. Bazinas** (International Trade Law) asked, now that the unified rule had been adopted, whether it was still of value to include, as originally intended, guidance to States as to possible approaches under options A to D. The commentary might simply refer to the advantages and disadvantages of the different approaches without going into the actual options. It could then discuss recommendation 248 as adopted, explaining its advantages and disadvantages and how it would operate in relation to the issues of creation, third-party effectiveness, priority and enforcement. The commentary as a whole would need very little revision. A new paragraph 4 bis or 5 should probably be added in chapter X, section A, discussing the approach called for in the recommendation just adopted.

9. **Mr. Weise** (Observer for the American Bar Association) said that, if the proposal in document A/CN.9/XLIII/CRP.7 were, as suggested, used as the basis for wording to be included in the commentary, paragraphs 3 and 10 made the point raised by many members that property issues remained property issues under intellectual property law and their enforcement under the law of the grantor's location did not displace the need to refer to the *lex protectionis*.

10. **Mr. Dennis** (United States of America) said that the commentary should highlight the importance of the issue dealt with in recommendation 248, indicate why the chosen approach was the best, and explain the solution so that States could apply it. In discussing the recommended approach, its advantages should be stressed rather than the potential problems. Although it was a compromise solution, the Commission wanted every State to stand behind it.

11. **The Chairperson** said that it was the usual approach in the commentary to focus on the benefits of the recommendations made.

12. **Mr. Morán Bovio** (Spain) said that because the commentary had an educational value, he would not favour deleting the sections outlining the difficulties and the deliberations before the adoption of the recommendation. Also, the recommendation, presented as a satisfactory solution, should be discussed fully because it related to a very complex area.

13. **The Chairperson** said that none of the suggestions made was contradictory, and the secretariat would incorporate them in revising the commentary. Essentially there would be minor changes to the tone of the commentary, because there was now no need for it to be quite so neutral.

14. **Mr. Bazinas** (International Trade Law Division) asked whether the Commission still wished to refer to the so-called "accommodation rule" followed by many States.

15. **Mr. Deschamps** (Canada) said that, given the consensus now on a single rule, he believed it was not necessary to elaborate on the accommodation rule. In any case, the accommodation rule was not specific to intellectual property, security in intellectual property or security in general; rather, it was a general rule of private international law.

16. **The Chairperson** said she took it that the Commission wished not to include that point in the commentary.

17. *It was so decided.*

18. *A/CN.9/700/Add.6, chapter X, as orally amended, was adopted.*

19. *A/CN.9/700/Add.6 as a whole, as orally amended, was adopted.*

A/CN.9/700/Add.7

20. **The Chairperson** drew attention to the last part of the draft Supplement to be adopted, the annex on terminology and recommendations contained in document A/CN.9/700/Add.7. The document would be revised to reflect the amendments to the terminology and recommendations adopted in the course of the Commission's deliberations. It would also be included in the report as an annex.

21. *A/CN.9/700/Add.7, as orally amended, was adopted.*

Draft decision A/CN.9/XLIII/CRP.5: Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property

22. **Mr. Bazinas** (International Trade Law Division), introducing draft decision A/CN.9/XLIII/CRP.5 adopting the Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property, said that the beginning of the last preambular paragraph would, at the request of the Chairperson, be redrafted to read "Expressing its appreciation to the participants of Working Group V as well as to the secretariat,". In paragraph 1, the words "dealing with" after the word "Transactions" should be replaced by the words "under the title: Supplement on". In paragraph 2, the words "to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property" would be deleted after the word "Supplement". In paragraph 3, the same words would be omitted after the first occurrence of the word "Supplement".

23. *Draft resolution A/CN.9/XLIII/CRP.5, as orally revised, was adopted.*

The meeting was suspended at 4 p.m. and resumed at 4.40 p.m.

Possible future work in the area of security interests (A/CN.9/702 and Add.1)

24. **Mr. Bazinas** (International Trade Law Division), introducing the note by the secretariat on possible future work on security interests (A/CN.9/702 and Add.1), said that five proposals had emerged from the discussions of Working Group VI in 2009.

25. In making its first proposal, in topic A, security rights in non-intermediated securities, the Working

Group had decided to exclude rights in intermediated securities both on account of the specific issues raised and because the subject matter was covered by the 2006 Convention on the Law Applicable to Certain Rights in respect of securities held with an Intermediary of the Hague Conference and the 2009 Convention on Substantive Rules for Intermediated Securities of the International Institute for the Unification of Private Law (Unidroit) respectively. As those Conventions provided no guidance to States in respect of security rights in non-intermediated securities, the Commission could usefully seek to fill that gap, basing its treatment on the *UNCITRAL Legislative Guide on Secured Transactions*. The proposed work would need to be coordinated with Unidroit, including with regard to financial markets where the issue of non-intermediated securities needed to be taken into account. The two options for future work were to ask Working Group VI to prepare a text on the topic, possibly as a supplement to the *Guide*, or to leave it for further study by the secretariat.

26. The second proposed topic, B, on the registration of security rights in movable assets, was covered in the *Guide*, particularly chapter III, which needed, however, to be read in conjunction with other chapters. Secured transactions law reform was inconceivable without an efficient registry, which required, in turn, good regulations. Considerable interest had already been shown by the Commission in the topic, on which further work could take the form either of referral to the Working Group with a view to the preparation of a text on registration, or further study by the secretariat.

27. The idea of a model law on security rights in movable assets, topic C, had been mooted in the Working Group, where it had met with a mixed response. Some experts had considered that despite the existence of a European Model Law and a Model Inter-American Law on secured transactions as well as a number of other related regional laws, no model law yet existed on the subject that could apply to every State in the world; however, other experts had felt that the topic should be set aside for the time being, so as to see how far the recommendations in the *Guide* might prove sufficient in that regard. Views on feasibility had also been divided: it had been suggested that it might not be easy to find the necessary agreement to transform recommendations into a model law and that several model laws might be required in view of the different types of security assets. It had been concluded that further study was needed.

28. Turning to proposed topic D, on rights and obligations of the parties to a security agreement, he recalled that an important principle set out in the *Guide* was the principle of party autonomy which required that, barring exceptions, parties might agree on how to address issues arising in a security agreement. They were accordingly in need of guidance in that respect, based on best contractual practices. It was therefore proposed that a text should be drawn up for that purpose, to complement the *Guide*.

29. The fifth proposed topic, E, on intellectual property licensing, was not an aspect of secured transactions law and would therefore not be referred to Working Group VI; it had, however, grown out of discussions within the Group. As no specific law existed on intellectual property contracting, which was at the intersection of intellectual property law and contract law and consequently came under the remit of several organizations, the Commission might take steps to fill that gap. The question was which part of the vast area of law relating to the subject could be addressed by the Commission and within what time frame. Further information was needed in order to determine the best way to proceed; that required further study by the secretariat.

30. He referred in conclusion to the current status of the United Nations Convention on the Assignment of Receivables in International Trade and recalled the Commission's recommendation that all States that had not yet done so should consider becoming parties. The Commission might wish to reiterate that recommendation, take note of the proven usefulness of the *Guide* in the area of secured transactions and request the secretariat to promote the implementation both of the *Guide* and of the Supplement thereto, following its adoption at the current session.

31. **The Chairperson** invited comments on the various topics. The Commission could then consider which were of interest, and then determine in which order of priority to take them up.

32. **Mr. Kohn** (Observer for the Commercial Finance Association) said that the Commission could usefully include in its future workplans the matter of security rights in non-intermediated securities, a category of commercial asset not addressed in the *Guide* but frequently present in transactions as pledges of a

borrower's or borrower's subsidiary's shares. Those shares were not intermediated, in other words, they were not traded in a recognized market. Laws on corporate governance, taxation or financial assistance at times made it impossible for a borrower to grant an interest in its own assets, such as receivables, inventory or intellectual property, leaving directly held securities as the only collateral that could be provided to a lender. A supplement to the *Guide* dealing with security rights in non-intermediated, non-public securities would be extremely valuable, as it would fill the last remaining gap in the *Guide*'s coverage of assets that played a role in commercial financing transactions.

33. **Mr. Umarji** (India) said that the practice of lending against promoter shares not listed on any stock exchange was a common practice among banks. Such transactions were currently treated as if they involved possessory securities, with enforcement rights being exercised also as if they involved possessory securities. The only constraint was that, because the shares could not be sold on the market, they must be sold by private placement. The Commission should ensure that such securities were covered in the *Guide*, though it should take into account the fact that, having carried out work in connection with intermediated securities, Unidroit might take up the matter of non-intermediated securities.

34. **Mr. Morán Bovio** (Spain) said that it was clear from documents A/CN.9/702 and Add.1 that the Working Group and the secretariat had important expertise and experience in a variety of areas. None of the possible topics of future work listed therein could be discounted. While the Commission could attach priorities to those topics, it was for the Working Group to define their actual scope.

35. **Mr. Cochard** (Observer for the Association Française des Entreprises Privées) said that, while he was himself involved in representing the Government of France in the Unidroit discussions on intermediated securities, the association he was representing in the Commission was an issuer of securities and was concerned with the direct rights between issuers and investors. In view of his experience with both bodies, he considered that non-intermediated securities were more an issue for Unidroit, which had worked on the securities issue for a decade already, and could easily extend the scope of its work. The Commission had left non-intermediated securities aside for a number of reasons, including the very specific considerations involved.

36. Moreover, he was concerned that, judging by the explanations given in paragraphs 8 and 25 in particular of document A/CN.9/702, the Commission had not properly grasped some of the concepts involved. He had had occasion to point out, in previous discussions in the Commission and in Commission colloquiums, that it was inappropriate to assimilate in all cases securities held with intermediaries and indirectly held securities. The link between an investor and an issuer in terms of ownership of a security depended on the jurisdiction. The situations in China, France and the United States of America, for example, were not comparable. The risk of not grasping such concepts properly included a conflict between the recommendations regarding registration in document A/CN.9/702 and the European Union Directive on Financial Collateral Arrangements Directive (2002/47/EC).

37. **Mr. Dennis** (United States of America) said that his delegation agreed with the observer for the Commercial Finance Association on the importance of providing guidance on security rights in non-intermediated securities, and with the representative of Spain on the significance of all the suggested topics for future work. He emphasized, however, that the matter of intellectual property licensing was not related to secured transactions.

38. **Mr. Riffard** (France) said his delegation had concluded, on the basis of documents A/CN.9/702 and Add.1 and the outcome of the Third International Colloquium on Secured Transactions, that there appeared to be no reason not to apply the rules in the *Legislative Guide* to non-intermediated securities. He therefore wondered whether it was worth mobilizing, and consuming the time and energy of, a Commission working group, for one or more years, in connection with an issue which could be coped with simply by means of deletion of a phrase in the *Legislative Guide* the statement that it did not apply to indirectly held securities. It could be stated that the *Legislative Guide* applied to indirectly held securities subject to the scope of the discussions being conducted by Unidroit. It would seem logical to request the Commission to investigate such an approach and contemplate extending the scope of the *Guide*.

39. **Ms. Hu** Shengtao (China) said that her delegation supported the comment by the observer for the Commercial Finance Association concerning topic A, on security rights in non-intermediated securities. It also agreed that topic E, intellectual property licensing, was not a secured transaction topic. The other topics could be taken up by the Working Group but, in view of the limited time and resources available, they must be prioritized.

40. **Mr. Dennis** (United States of America) said that his delegation was in favour of retaining all the topics but would like intellectual property licensing to be considered as a separate matter since it did not relate specifically to secured transactions.

41. **Mr. Morán Bovio** (Spain) said that his delegation was in favour of retaining all the topics on the Commission's agenda regardless of the outcome of any future work by Unidroit. Any overlap must be avoided but that did not mean that the Commission should not start work on topics that might be taken up at a later stage by Unidroit.

42. **The Chairperson** noted that it was suggested in document A/CN.9/702, paragraph 42, that the Commission might wish to assign a lower priority to topic A, security rights in non-intermediated securities, in order to allow time for Unidroit to complete its work on the commentary and the accession kit to the Unidroit Securities Convention and to develop further its future work on capital markets. Collaborative efforts between the two bodies might be appropriate in order to ensure that there was compatibility between the *Guide* and the future work of Unidroit. Accordingly, she suggested that the Commission should consider the order of priority of topics B, C and D.

43. **Mr. Dennis** (United States of America) said that his delegation was in favour of according priority to topic B, registration of security rights in movable assets. As noted in paragraph 66 of document A/CN.9/702, secured transactions law reform could not be effectively implemented without the establishment of an efficient publicly accessible security rights registry and the *Guide* did not cover the myriad questions that must be addressed and resolved.

44. **Mr. Umarji** (India) said that his delegation agreed that priority should be given to topic B. Following the finalization of the *Guide*, enacting States would need to modernize their secured transactions laws; since most States already had registration systems it would be very important to determine how to set up a new system and make it operational.

45. **Mr. Wiegand** (Observer for Switzerland) and **Mr. Tosato** (Italy) expressed support for the comments made by the representatives of India and the United States of America.

46. **Mr. Morán Bovio** (Spain) said that his delegation attached great importance to topic B, not only in relation to the *Guide* and the Supplement, but also because work on the topic would help strengthen the Receivables Convention.

47. **Ms. Umoren** (Nigeria) said that her delegation supported the view that the Commission should not take into account work being carried out by Unidroit; the Commission's task was harmonization of law and it would harmonize its work with Unidroit when the time came. Topic B was very important as, without the establishment of a publicly accessible registry system, the *Guide* itself would be incomplete.

48. **Mr.** Son **Seoung-woo** (Republic of Korea) said that his delegation agreed that priority should be given to topic B.

49. **The Chairperson** said she took it that the Commission considered that the next topic for Working Group VI should be the preparation of a text on registration of security rights in movable assets. She asked whether there was any objection to the guidelines set forth in paragraph 67 of document A/CN.9/702.

50. **Ms. Smyth** (Australia) said that her delegation did not object to the content of that paragraph and supported the views already expressed about according priority to topic B. It was important, however, that any future work by the Commission should not duplicate work already undertaken, and should not conflict with the provisions of the Cape Town Convention on International Interests in Mobile Equipment.

51. **The Chairperson** said that the Cape Town registry was an international registry of a specific nature; it might be more useful for the Commission to focus on work done in a national or regional context.

52. **Ms. Walsh** (Canada) said that the aircraft registry established under the Cape Town Convention was rather different from a security rights registry; while certain aspects of the operation of the Cape Town

registry could provide guidance to the Commission, the security rights registry would be much broader in scope.

53. **Mr. Brennan** (Independent Film and Television Alliance) said that, with regard to topic E, it would be wise to ask the secretariat to prepare a paper on intellectual property licensing so that the Commission would know what such a project would entail.

54. **Mr. Agthe** (International Trademark Association) said that the members of the International Trademark Association had reacted with extreme scepticism to the idea of the Commission's preparing a text on intellectual property licensing. Certain discrete topics might be appropriate for consideration, however, so he agreed that further study might be in order.

55. **Mr. Umarji** (India) said that it was important to determine what kind of property right would be created when a licence was granted and whether the licensee would be able to use such a licence as security for a loan.

56. **Ms. Longcroft** (World Intellectual Property Organization) said that the World Intellectual Property Organization (WIPO) was opposed to the idea of the Commission taking up topic E on intellectual property licensing because of the differentiated nature of technology markets, the complexity and rapidity of developments and the sensitivity of questions related to the licensing of technologies in certain areas and the Commission's lack of expertise to deal with such areas. At a time of limited resources, the challenge was to avoid overlap and find the most efficient way forward.

The meeting rose at 6 p.m.